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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1969.

No. 205.

TENNESSEE VALLEY SAND & GRAVEL COMPANY,
Petitioner,

versus

BOBBY JOE CRAFTON,
Respondent.

ORIGINAL BRIEF OF LAW ON BEHALF OF BOBBY JOE CRAFTON, RESPONDENT.

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INTRODUCTION.

This Brief of Law of Respondent is filed in opposition to a Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW.

The Respondent hereby adopts and makes reference to the opinions of the District Court and of the Court of Appeals for the Fifth Circuit as reproduced in Appendix A and B, respectively, of the Petitioner's Petition for a Writ of Certiorari. Furthermore, the Respondent will make reference herein to the Appendix filed in the United States Court of Appeals for the Fifth Circuit which he assumes has been forwarded to this Court. Such reference will begin with "A" and then give the page number or numbers.

JURISDICTION.

The Petitioner seeks to invoke the jurisdiction of this Court under 28 U. S. C., Sec. 1254 (1). The Respondent submits that after a careful consideration of the facts of this case together with the decisions rendered in the District Courts, Courts of Appeal, Fifth Circuit, and in this Court, the Petition should be denied.

QUESTIONS PRESENTED.

The Petitioner represents that the decisions in the lower courts were limited to the misapplication of the decision of this Court in **Braen v. Pfeifer Oil & Transport Co.**, 361 U. S. 129, 80 S. Ct. 247 (1959), and created a "new frontier" of Jones Act coverage. Such is not the case. The question presented here for review is not so restricted. As pointed out by the Court of Appeals for the Fifth Circuit in its per curiam opinion (Appendix B, pp. 17-18 of the Petition), the issue is whether the conclusion of the District Court is sustained by the underlying facts.

STATEMENT OF THE CASE.

The statement of the facts of the case as contained in the Petition of the Petitioner contains many inaccuracies and is presented in an adversary manner to be most favorable to Petitioner's position. The statement of facts as found by the District Court in its Memorandum Opinion (A-12, 13, 14 and 15, and in Appendix A, pp. 11, 12, 13 and 14 of the Petition) is adopted by the Respondent for the statement of his case. However, in addition thereto, the Respondent would like to point out some additional evidence and to suggest corrections contained in the recital of facts by the Petitioner.

The "new dredge" was made by welding four (4) barges together to form a single vessel to serve as the vessel upon which dredging equipment was to be installed

(A-19, 20, 22). Each of the barges was originally built in 1941 and acquired by the appellant. Each barge was used to transport sand and gravel up and down the Tennessee River from a point near Savannah, Tennessee to a point near Huntsville, Alabama and points in between. This use continued until approximately January, 1966 when work was started in preparation for the "new dredge" (A-23). Ingalls Iron Works Company in Decatur welded together the four (4) barges to form a single vessel at Ingalls Ship Yard in Decatur, Alabama (A-20, 22 and 23). This vessel made its maiden voyage from Decatur, Alabama to Sheffield, Alabama when it was navigated on the river a distance of approximately forty-five (45) miles (A-68). The vessel did not and would not have any motor power and was not self-propelled (A-98). However, it was fully completed insofar as it would pertain to floating and navigating at the time the appellee was injured (A-99).

In order to completely understand the various alternatives that were presented to the trier of the facts, the unique manner of the placing of dredging equipment on this "new dredge" or "new vessel" should be clearly understood. The Petitioner did not put this vessel in dry dock but at all times that any such work was performed on the vessel it was upon the navigable waters of the Tennessee River. It was tied to the Sheffield City Dock and was frequently moved and navigated in the waters of the river. Pertinent testimony of M. P. Willingham, Superintendent of the work being done on the "new dredge", and the manager of the Petitioner's Sheffield Docks, starting at the bottom of page 69 and going through the top of the page of 72 of the Appendix is most enlightening. During the time that the dredging equipment was being placed on this vessel, the docks would have to be used to load and unload barges and the "new dredge" would have to be moved back and forth

to allow barges to come into the Sheffield docks (A-70). It would be necessary for the "new dredge" to be moved out in the river to allow the barges to come in and this occurred fairly frequently during the time that the "new dredge" had been at the Sheffield docks (A-70). In moving the "new dredge" in and about the waters of the Tennessee River around the Sheffield Docks, tow vessels were used and also a crane was used. Mr. Willingham stated that people referred to him as a "towboat" when using his crane. He could take the vessel way out and could top it around and pull the barges up with it and top the other vessels around to get through (A-71). It is also important to understand the size of this "new dredge". It was 190 feet long by 52 feet wide (A-23), and weighed approximately 320 tons from the barges themselves, exclusive of equipment thereon (A-24). Regardless of whether the "new dredge" was navigated by a motor towboat or by "Towboat" Willingham's crane, the trier of facts obviously realized that it was necessary to have a "crew" performing seaman's tasks in connection with the frequent movements of the "new dredge" on the navigable waters of the Tennessee.

The petitioner states that respondent worked on the "new dredge" for 6 days, however, there was testimony that he only worked 3 days on this vessel (A-34 and 47).

During the three (3) days that the Respondent worked on the "new dredge" (A-34, 47) this vessel was moved in the river one time by crane and one time by a tow vessel and he was on the "new dredge" as it was being moved in the river (A-36, 37).

The work that Crafton was to do upon the "new dredge" was painting (A-35, 45, 59, 60 and 61), which historically and traditionally has been work that has been done by seaman aboard a ship. The "new dredge" was capable of hauling (A-46).

The recital of facts by the Petitioner infer that Respondent was hired to work on the "new dredge". However, Crafton was not re-employed to come down to the Sheffield Docks and no one had informed him that his status was changed (A-37). It is clear that his work on the "new dredge" was a temporary assignment (A-60, 92), and that it was the understanding of the company that his permanent job was to work with the McCULLOUGH and the EMMA COFFEY (A-92). Up until the three (3) days that Crafton spent on the "new dredge" his work for the appellant had all been on the DREDGE McCULLOUGH and the motor vessel EMMA COFFEY since the date of his employment (A-34). There was testimony that up until the time that Crafton went to work on the "new dredge" he had only lost one day from his work when the work got slack (A-44). Crafton denies that anyone told him that the reason for sending him down to the "new dredge" was because work was slack at the old dredge (A-45).

The Petitioner points out on page 5 of its Petition that it kept separate time cards for Crafton's work on the "new dredge", as opposed to his work on the Dredge McCULLOUGH. However, the separate records were kept for cost purposes in order to show the cost of the "new dredge" (A-90). Thus, the separate time cards do not infer that Crafton was not a seaman in both instances.

Finally, Petitioner stresses in its Statement of the Case that Crafton initially accepted benefits under the Longshoreman's and Harbor Workers Act. This fact is irrelevant and obviously should not prejudice Crafton's position since the able District Judge pointed out that this initial action did not constitute an estoppel or bar to Jones Act coverage (Appendix A, on p. 15 of the Petition).

REASONS FOR DENYING THE WRIT.

In its Memorandum Opinion, the District Judge specifically rebuts the primary contention of the Petitioner at the trial of the case. The Petitioner had contended that while Crafton was a seaman while on the McCULLOUGH and on the EMMA COFFEY, that his duties were those of a shipbuilder when temporarily assigned to the "new dredge". Through this rebuttal of the Petitioner's contention the District Court points out that Crafton, **as thus viewed**, would have been a seaman and a member of the crew of the McCULLOUGH and/or the EMMA COFFEY at the time of the injury, but still within the course of his employment while on a temporary assignment to the "new dredge" in preparing it for use with the other two vessels.

However, the evidence in the case presented different factual situations from which the lower court could have found that Crafton was a seaman in its judgment and, therefore, the Jones Act was his remedy. The evidence in the case allows for the following several alternatives, any one of which the Trial Court could have found to be correct in its decision:

1. The Respondent was a member of the crew of the McCULLOUGH and the EMMA COFFEY and was injured within the course of his employment with the Petitioner on the "new dredge".

2. Crafton was a seaman upon the "new dredge" and, therefore, came within the purview of the Jones Act.

3. The Respondent was a member of the crew of all three (3) vessels and the Jones Act was applicable.

The Respondent contends that under the evidence in this case there was presented an evidentiary basis for the trial court's finding of the necessary elements to bring

this case within the purview of the Jones Act, 46 U. S. C. A., Section 688, to support the judgment of the lower court that Crafton was a seaman and to prevent the judgment of the lower court from being disturbed. **Butler v. Whiteman**, 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed. 2nd 754 (1958), and **Bodden v. Coordinated Transport, Inc.**, 369 F. 2d 273 (Ct. of App., 5th Cir.—1966).

The facts of the case and the applicable law support a finding by the lower court that Bobby Joe Crafton was a "seaman" within the Jones Act for the Dredge McCULLOUGH and the motor vessel EMMA COFFEY while he was performing his duties on the "new dredge", within the line and scope of his employment.

Crafton's work on the "new dredge" was within the course of his employment as a "seaman" on the Dredge McCULLOUGH, and/or the motor vessel EMMA COFFEY since the future plans for the "new dredge" involved its use in connection with the other two (2) vessels. The EMMA COFFEY will be used as a dredge tender for the new dredge (A-69). The "new dredge" was constructed to replace the Dredge McCULLOUGH, as shown on p. 3 of the Petitioner's Petition.

Petitioner seems to infer that it acted with benevolent kindness in allowing Crafton to work on the "new dredge" rather than laying him off while work was slack. We suggest that the facts also lend themselves to the interpretation that the Petitioner made this decision more as an economic gain to itself rather than as an act of charity for its "seamen". Mr. Jumper, the Manager of Sales and Operations for Tennessee Valley Sand & Gravel Company, testified that the appellant decided to construct the "new dredge" itself because **it figured it could save money** (A-85). What better personnel could the Petitioner employ to work on the "new dredge" than some of its own "seamen" who were already trained and could perform the duties required on the job which a "seaman"

would know, such as painting and navigating boats, including the tying of vessels to a dock or to other vessels, as well as performing their other duties? It was certainly to the interest of the Petitioner to have seamen from a Dredge who were experienced with dredging equipment to install dredging equipment on the "new dredge". Also, as the able District Judge pointed out, it was in the interest of defendant to maintain the integrity of the members of the crews on both ships by assigning idle seamen to other work in its employment (A-15).

An important case on this point is **Williams v. Milwhite Sales Co.**, 197 F. Supp. 730 (D. C. E. D. La., 1961). In that case, the Plaintiff sought recovery under the Jones Act. The Defendant's business consisted of operating a warehouse with wharf frontage from which chartered barges were loaded with bags of drilling mud. The barges, towed by a chartered tug, were then brought alongside the offshore drilling rigs and unloaded. The Plaintiff alleged that he was a member of the Billy Bob since it was his job to assist in loading the barges, to accompany the barges and the tug to location, and to assist in the unloading. This operation often took several days, during which he slept and ate aboard the barge or the tug. At the time of the accident in suit, **work was slack and the Plaintiff was assigned by his employer to repack bags of mud in the warehouse.** Defendant's contentions included that the Plaintiff was not a member of a crew of a vessel and that he was primarily a laborer. The Court, in an opinion by Judge Skelly Wright, denied the Defendant's motion for summary judgment and held that the Plaintiff's allegations and supporting deposition made out a question for the jury to determine Jones Act coverage. He stated on p. 732 of his opinion:

> ". . . The fact that a claimant was working ashore at the time of the accident is not decisive, nor is the fact that the claimant at the time of his injury was assigned to duties unrelated to his vessel. In de-

termining Jones Act coverage the initial inquiry, of course, is whether the Plaintiff was employed as a member of a crew of a vessel. Once this is established, any injury suffered in the course of employment is covered irrespective of the place or the nature of the work being performed at the time."

"The suggestion is made that since Plaintiff was assigned to no particular barge, he had no more or less permanent attachment to a vessel and, consequently, was not a member of a crew. But the manner in which an employer decides to assign its work may not deny a seaman his rights under the Jones Act. As long as the seaman is working as such for his employer, although on different vessels, he nevertheless may be a member of a crew of a vessel and covered by the Act . . ."

The **Williams** case is almost directly in point with the case at hand since Tennessee Valley Sand & Gravel Company has argued, as was mentioned before, that Crafton was assigned to the "new dredge" because "work was slack" on the Dredge McCULLOUGH.

Another case in point is **Braen v. Pfeifer Oil Transportation Co., Inc.**, 80 S. Ct. 247, 361 U. S. 129, 4 L. Ed. 2d 191 (1959). There, Justice Douglas stated the test as whether the seaman was injured by negligence while in the course of his employment. He said:

"The fact that the injury did not occur on the vessel is not controlling . . . A 'seaman' may often be sent off ship to perform duties of his employment . . ."

The Petitioner, on pp. 6-7 of its Petition, seeks to distinguish the **Braen** case on the ground that Crafton's work assignment on the "new vessel" was unrelated to the service of the Dredge McCULLOUGH, or Tender EMMA COFFEY. As was stated earlier herein, Respondent contends that his work assignment on the "new vessel" was clearly related to the service of the Dredge

McCULLOUGH, and/or EMMA COFFEY. However, even if Crafton's service was unrelated, we feel that Tennessee Valley Sand & Gravel Company is misconstruing the **Braen** case in view of the following interpretation of the majority opinion found in Justice Harlan's dissent:

> ". . . the court seems to say here that a crew member may recover under the Jones Act for injuries arising out of activities not directly related to the affairs of the vessel . . . and not incidental to his shipboard work . . ."

Another case almost synonymous with our facts is **Tyndall v. Conduit and Foundation Corporation**, 169 F. Supp. 299 (D. C. E. D.-Pa. 1959). There, the libellant was a regular member of the crew of a dredge called "The Biff" and was also the master of a motor vessel named "The Harry, Jr.", which was used to tow dredge and other work boats. However, at the time of the injury, the libellant was temporarily engaged in repairing and restoring two carfloats and had been for a period of approximately **seven days**. The Court (as trier of the facts) held that the Libellant was a "seaman" entitled to the benefits of the Jones Act regardless of whether he was on the vessel to which he was attached as a member of the crew at the time of the injury, as long as he was in the course of his employment with his employer. The Court points out that Libellant was a seaman at the time of the accident by reason of his duties and services aboard the Biff and the Harry, Jr. and his status carried over when he was assigned, in the course of his employment, to repair and keep afloat respondent's carfloat. The learned Court further pointed out that the Jones Act was remedial in nature and should be liberally construed to offer the protection Congress intended to this group of individuals. This case was affirmed on appeal (269 F. 2d 947, CA 3, 1959). The Appellate Court felt that the case of **Butler v. Whiteman**, 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed. 2d 754

(1958), was dispositive of the issues as to whether Tyndall was a "seaman" within the purview of the Jones Act.

How is the situation in Tyndall any different from Crafton's work on the "new dredge" which was in direct relationship to the Dredge McCULLOUGH, which it was to replace upon its completion and to the EMMA COFFEY, which was to serve as dredge tender for the "new dredge"? Besides—who are better prepared to install dredging equipment than seamen who had experience with dredging equipment? Thus, the facts of the cases are clearly parallel and the **Tyndall** case supplies further authority in support of the decision of the able District Judge.

In recent years, the courts have extended the holding that a seaman is entitled to recover under the Jones Act even if he is injured in an automobile accident many miles from his ship if he is "in the course of his employment." See: **Magnolia Towing Company v. Pace**, 378 F. 2d 12 (Ct. of App., 5th Cir. 1967), and **Hopson v. Texaco, Inc.**, 383 U. S. 262, 86 S. Ct. 765 (1966).

An employer who works men on vessels should not be permitted to exculpate himself from the responsibility for negligent conduct under the Jones Act on the premise that the employee's duties were not confined to a single ship but involved many ships. See: **Mach. v. Pennsylvania Railroad Company**, 207 F. Supp. 233 (D. C. W. D.-Pa. 1962). This case held that the duties of a seaman could relate to many ships and they need not necessarily be confined to one ship.

The Petitioner's hypotheticals on p. 7 of its Petition about temporarily assigning Crafton as a typist, grass cutter, or welder are in no way synonymous with the facts herein and grossly overstate the breadth of the ruling of the District Court. If Crafton had been so assigned, his duties would likely have been nonmaritime

in nature while his duties on the "new dredge" included the tasks of a "seaman" (A-36) and the "new dredge" was complete as far as navigation was concerned (A-37). However, the Respondent contends that if there had been a temporary assignment to these tasks, such hypothetical situation would have been controlled by **Braen**, unless the employer made it clear to the employee that his status had changed and he was no longer entitled to seaman's rights. Respondent would suggest that Jones Act Coverage of a seaman in a dance hall as was the situation in the case of **Warren v. U. S.**, 340 U. S. 523, 71 S. Ct. 432, is more far reaching than Petitioner's hypotheticals.

Furthermore, Petitioner contends that this case will require every Deputy Commissioner, in any Longshoreman's and Harbor Workers' Act proceeding, to inquire into the work previously performed by the injured employee. This argument also misconstrues the import of the District Court's ruling. The Memorandum Opinion of Judge Lynne points out that Crafton could have been a member of the crews of the EMMA COFFEY and the McCULLOUGH in preparing the "new dredge" for use therewith. In other words, Crafton could have been in the "service of his ship" (McCULLOUGH and/or EMMA COFFEY) when the accident occurred.

Under the evidence in this case the lower court could have found that, at the time of his injury, Bobby Joe Crafton was a "seaman" of the "new dredge" under the Jones Act while performing his work on the "new dredge." At the time of Crafton's injury, the "new dredge" was completed as far as making it float and navigable in the river (A-37). It was not in dry dock and the Tennessee River at the dock was about fifteen feet deep (A-33). It had fairly frequently been moved around in the river by crane and by motor vessels (A-70, 71). It was of such size that it required seamen during movements. At the time of Crafton's injury, the "new dredge" could have been used for hauling (A-46). He

performed the duties of tying the vessel to other vessels or to docks on all three vessels (A-32, 36). These facts and the other facts listed under the statement of the case are sufficient for the trier of the facts to have made a determination that Crafton was a seaman on the "new dredge" whose job tasks were maritime in nature. While he might have, at moment of the injury, been performing the task of equipping the vessel with dredging equipment, this would not have changed his status.

There have been decisions where a ship was under construction that an injured maritime employee was entitled to indemnity in consequence of the ship's unseaworthiness or failure to supply or keep in order the proper appliances appurtenant to ships. See:- 79 CJS, Seaman, Sec. 195, **Pacific American Fisheries v. Hoof,** 291 F. 306 (Ct. of App., 9th Cir. 1923), and **U. S. v. Lendgren,** 28 F. 2d 725 (Aff'd, 281 U. S. 38, 50 S. Ct. 207, 74 L. Ed. 686).

A "vessel" is defined at T. 1, Section 3 of the **United States Code,** as including every description of water craft or other artificial contrivance used or capable of being used as a means of transportation on water.

The "new dredge" was in the navigable waters of the Tennessee River. A case on this point is **Bodden v. Coordinated Transport, Inc.,** 369 F. 2d 273 (Ct. of App., 5th Cir.—1966). The Court held in that instance that a summary judgment should be reversed and stated that it would be a rare factual situation where the question of whether the ship was in navigation could be resolved as a matter of law. The Fifth Circuit in that case relied heavily on **Butler v. Whiteman,** 356 U. S. 271, 78 S. Ct. 734, 2 L. Ed. 2d 754 (1958).

On p. 5 of Tennessee Valley Sand & Gravel Company's Petition, it relies on the cases of **Frankel v. Bethlehem-Fairfield Shipyard,** 132 F. 2d 634 (CA 4, 1942); **Alfred v. MV Margaret Lykes,** 398 F. 2d 684 (CA 5, 1968), in sup-

port of its contention that a worker aboard an uncompleted vessel is not a seaman and member of the crew of that vessel. These two cases are markedly distinguished from our facts in that the rationale of both of them was controlled by the fact that the libelant was employed by a shipbuilding corporation engaged in nonmaritime work and was not a "seaman" within the meaning of the Jones Act inasmuch as he was not engaged in maritime employment at the time of the accident. In other words, he was working under a nonmaritime contract and so would not be a member of the "crew" of the ship. Also, the ships had not been completed in connection with their ability to navigate in both instances. These facts clearly differ from our case in that Crafton was not employed under a nonmaritime contract and the "new dredge" was completed as far as navigation was concerned at the time of his injury (A-37).

CONCLUSION.

The lower court's judgment in this case should not be disturbed because of the following:

The facts are such that the court's judgment has an evidentiary basis and therefore, should not be disturbed. **Williams**, **Braen** and **Tyndall** are sound authority for sustaining the District Court's judgment on the grounds that Crafton, at the time of his injury, was a "seaman" within the Jones Act for the Dredge McCULLOUGH and the motor vessel EMMA COFFEY, while performing his duties on the "new dredge" since he was within the line and scope of his employment. Under the factual situations presented by the evidence in this case, Crafton could have well have been a seaman on the "new dredge" or on all three vessels.

Regardless of the alternatives which the learned trial Judge may have determined, he applied established federal authority in rendering his opinion in making his

decision from the evidence. In doing so, he administered the beneficent provisions of the Jones Act in the manner which Congress intended that they be liberally applied. The District Court's ruling that Crafton was a "seaman" within the Jones Act at the time of his injury is supported by ample federal precedent and the Petition for Writ of Certiorari should be denied.

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Certificate of Service.

I hereby certify that a copy of the foregoing Brief has been served upon the Petitioner through its various Counsels of Record on this the 17th day of July, 1969, by air mail.

.....
Howell T. Heflin.